

9-28-2016

## State v. Wengert Appellant's Brief Dckt. 44302

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ERIC D. FREDERICKSEN  
Interim State Appellate Public Defender  
I.S.B. #6555

BRIAN R. DICKSON  
Deputy State Appellate Public Defender  
I.S.B. #8701  
P.O. Box 2816  
Boise, ID 83701  
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44302
Plaintiff-Respondent,	)	
	)	TWIN FALLS COUNTY NO. CR 2008-5427
v.	)	
	)	
ROBERT MICHELL WENGERT,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Robert Wengert contends the district court abused its discretion when it denied his motion for a reduction of his sentence pursuant to I.C.R. 35 (*hereinafter*, Rule 35). As such, this Court should reduce his sentence as it deems appropriate, or, alternatively, remand this case for a new decision on his motion.

Statement of the Facts & Course of Proceedings

Mr. Wengert initially pleaded guilty to attempted strangulation and the district court imposed a unified sentence of ten years, with five years fixed. (R., pp.68, 79.) However, it also retained jurisdiction over the case. (R., p.80.)

During that period of retained jurisdiction, Mr. Wengert participated in a rider program. (See Presentence Investigation Report (*hereinafter*, PSI), pp.2-10.) He completed all his assigned classes, which included earning his GED. (PSI, pp.3, 5.) In fact, he was the valedictorian of his graduating group. (PSI, p.5.) He received no formal disciplinary sanctions during that program, and only one written warning. (PSI, p.4.) The district court subsequently suspended Mr. Wengert's sentence for a three and one-half year period of probation. (R., pp.111-14.)

A motion for probation violation was filed two weeks before that period of probation would have concluded, alleging Mr. Wengert had violated the terms of his probation by "failing to pay all Court costs, fines and restitution by March 10, 2012." (R., pp.124-25.) Mr. Wengert ultimately admitted that violation, and, pursuant to a stipulation by the parties, the district court extended his term of probation by five years. (R., pp.148-52.)

Three years later, the State filed another motion to revoke Mr. Wengert's probation. (R., pp.161-62.) He admitted to violating his probation by committing the new crime of unlawfully possessing a firearm and by consuming alcohol. (See R., p.196 (indicating Mr. Wengert admitted some of the alleged violations, while others were withdrawn by the State).) The district court ultimately decided to revoke Mr. Wengert's probation and execute his underlying sentence. (R., pp.200-03.)

Fourteen days later, Mr. Wengert filed a motion for sentence reduction. (R., p.205.) The district court denied that motion, noting that no new or additional information had been presented in support of that motion. (R., p.209.) Mr. Wengert

filed a notice of appeal timely only from the order denying his Rule 35 motion.  
(R., pp.212-14.)

### ISSUE

Whether the district court abused its discretion when it denied Mr. Wengert's Rule 35 motion.

### ARGUMENT

#### The District Court Abused Its Discretion When It Denied Mr. Wengert's Rule 35 Motion

A motion to alter an otherwise lawful sentence pursuant to Rule 35 is addressed to the sound discretion of the sentencing court and is essentially a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Huffman*, 144 Idaho 201, 203 (2007). When petitioning for a sentence reduction pursuant to Rule 35, the defendant must show his sentence is excessive in light of new or additional information presented to the sentencing court. *Id.* "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994).

Mindful of the requirement to present new or additional information in support of a Rule 35 motion, *Huffman*, 144 Idaho at 203, which he acknowledges he did not satisfy, Mr. Wengert contends the district court abused its discretion when it denied his motion for a sentence reduction. For example, he has shown himself to be capable of being a productive member of society during his years on probation, as he was considered to be a reliable worker and friend. (PSI, pp.21-23 (letters of support for Mr. Wengert).) Therefore, although there may have been justifications for the sentence as

originally imposed (see R., p.210), the district court still should have reduced his sentence in response to his Rule 35 motion filed after several years spent on probation.

### CONCLUSION

Mr. Wengert respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 28<sup>th</sup> day of September, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28<sup>th</sup> day of September, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

ROBERT MICHELL WENGERT  
INMATE #88687  
ISCC  
PO BOX 70010  
BOISE ID 83707

G RICHARD BEVAN  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

GEORGE P ESSMA  
ATTORNEY AT LAW  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BRD/eas